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No. 07-526

# In The
# Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

*Petitioners,*

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## BRIEF OF PETITIONER TOWN OF CHARLESTOWN, RHODE ISLAND

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## QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 permits the Secretary to take land into trust for certain Indian tribes, thereby significantly impairing state jurisdiction. In *United States v. John,* 437 U.S. 634 (1978), this Court concluded that the 1934 Act contained a temporal "recognized [in 1934] tribe" limitation. Likewise, the Fifth Circuit has held that the 1934 Act "positively dictates" that the only Indian tribes for whom land can be taken into trust are those that were "recognized" and "under federal jurisdiction" as of "June 1934." The Ninth Circuit affirmed a district court decision to the same effect.

The Rhode Island Indian Claims Settlement Act provides land specifically for the later recognized Narragansett Indian Tribe and comprehensively disposes of all Indian land claims in Rhode Island. The Tribe received 1,800 acres of land for free. In exchange, Congress extinguished aboriginal title and all Indian interests in land in Rhode Island. The questions presented are:

1. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.

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## OPINIONS BELOW

The First Circuit sitting en banc issued a divided opinion, the subject of this appeal, reported at 497 F.3d 15 (1st Cir. 2007) (en banc) and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") 1-81. The court upheld the decision of the District Court for the District of Rhode Island reported at 290 F. Supp. 2d 167 (D.R.I. 2003). Pet. App. 84. Prior to the en banc opinion, a panel of the First Circuit issued two separate opinions. The first opinion is reported at 398 F.3d 22 (1st Cir. 2005). That opinion was withdrawn and the judgment vacated by Order of September 13, 2005. Pet. App. 137-38. The Panel reissued a divided opinion on September 13, 2005 that is reported at 423 F.3d 45 (1st Cir. 2005). That opinion and partial dissenting opinion were also withdrawn and the judgment vacated by Order of December 5, 2006. Pet. App. 139-41. That Order also granted en banc review. *Id.*

## JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007, and was granted with respect to the questions presented above on February 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The Indian Reorganization Act of 1934 (the "1934 Act" or the "IRA"), 25 U.S.C. § 461, *et seq*. and the Rhode Island Indian Claims Settlement Act (the "Settlement Act") 25 U.S.C. § 1701, *et seq*. are both reprinted in the statutory appendix to the Governor's brief.

## STATEMENT OF THE CASE

### A. Charlestown's Special Interest in This Case

This case was brought by Petitioners Donald L. Carcieri, the Governor of Rhode Island, the State of Rhode Island and the Town of Charlestown ("Charlestown" or the "Town"), a seaside, rural community with a population of about 8,000 in southern Rhode Island. The Town is situated differently than and represents an institutional interest distinct from the two state actors. All 1,800 acres of the Narragansett Indian Tribe's (the "Tribe") Settlement Lands are located in Charlestown and are the heart of the Tribe's ancestral home. Additionally, the Tribe's headquarters and health care center are located on fee land in the Town. The 31-acre parcel at issue here is in the Town, just across the street from the Settlement Lands.

Unlike the state actors, the Town interacts with the Tribe frequently, and in areas relevant to this jurisdictional dispute (*e.g.,* easements, access rights,

property taxation) that the state actors do not. Charlestown was the only municipality sued by the Tribe in its land claims lawsuits. It was the only municipality to sign the Joint Memorandum of Understanding to settle those lawsuits and the only municipality participating in the negotiation of the resulting Settlement Act, which ultimately placed the Settlement Lands under state and town jurisdiction.

The Charlestown police force is the first responder to incidents on the Settlement Lands and works with tribal police to address incidents occurring on and off those lands. The Town is often separately consulted concerning proposed action by the Tribe and/or the federal government on the Settlement Lands (*e.g.,* federal highway dollars, economic development proposals) and its jurisdictional concerns may differ from that of the state actors (*e.g.,* zoning, traffic, hours of operation). The Town opposed a tribal smokeshop on the Settlement Lands as well as a proposed tribal casino under the Indian Gaming Regulatory Act. In sum, the location of the Tribe and its land in the Town results in a special relationship foreign to other Rhode Island towns and different in nature than the state actors.

The Town joins the Governor and the State in challenging a decision by the Secretary of the Interior to convert a 31 acre parcel of land in Charlestown (the "Parcel") to trust under Section 465 of the IRA for the Tribe. The Town contends that the Secretary is prohibited from converting land to trust for the Tribe for two reasons. First, the IRA – the statutory source

of the Secretary's power to convert land to trust for Indians – requires recipient tribes to be federally recognized and under federal jurisdiction as of 1934. The Tribe meets neither express eligibility requirement. Second, the Settlement Act, which governs Indian land tenure in Rhode Island, prohibits the establishment and exercise of Indian territorial sovereignty in Rhode Island, including the establishment of sovereign authority arising from trust.

The Respondents are Dirk Kempthorne, in his capacity as Secretary of the Department of the Interior and Franklin Keel, in his capacity as Eastern Area Director of the Bureau of Indian Affairs ("BIA") within the Department of the Interior. They contend – and the courts below held – that neither the IRA nor the Settlement Act contain any limitation on the Secretary's power to convert land to trust for the Tribe anywhere in the Town of Charlestown or the State of Rhode Island.

### B. Historical Background

At one time one of the most powerful tribes in New England, the Narragansett were reduced in size and political power during the first 50 years of contact with English settlers by epidemics and conflicts with other tribal groups. Then, in 1675, the Tribe was drawn into King Philip's War, one of the bloodiest wars in American history and was decimated in the "Great Swamp Fight" in December of that year. In succeeding years, the Tribe was further defeated in

several large battles, with the result that much of the Tribe was disbursed. Some members joined other New England tribes or were captured and forced into indentured servitude among the colonists. Others were sold into slavery in the West Indies. A number of the remaining Narragansett survivors combined with a neighboring tribe, the Niantic, and the group, located in Charlestown, became known as the Narragansett Indian Tribe. United States Dep't of Interior, Recommendation and Summary of Evidence for Proposed Finding of Federal Acknowledgment 1-2 (July 29, 1982) *available at* http://www.indianz.com/adc20/Nar%5CV001%5CD007.PDF ("Recommendation").

From 1675 until 1880, the Tribe existed under a form of guardianship first under the Rhode Island colony and later under the State. Recommendation at 3-4. Because of the level of intermarriage to non-Indians and the poor economic condition of the Tribe, the State appointed a commission to determine whether it should abolish tribal relations of the group, make them citizens and end their relationship with the State. By 1850, "it was apparent that the Narragansett tribe had become extinct in all but name." *In re Narragansett Indians,* 40 A. 347, 362 (R.I. 1898). The Report of the Rhode Island Indian Commissioner in 1858 indicated that of the remaining Narragansetts, "there is not an Indian of full blood remaining; only two of three-fourths, and nine of half blood. The one hundred and twenty-one less than half blood are of mixed grades of Indian, negro and white." *Id.* In order to distribute the money

raised from the sale of tribal land to members of the Tribe, the State, in cooperation with the Tribal Council, prepared a list of approximately 324 tribal members (the "1880 Roll"). Recommendation at 16-17. The current requirement for membership in the Narragansett Indian Tribe is proof of lineal descent from the 1880 Roll, rather than any blood quantum requirement. Recommendation at 15.[1]

In 1879, the Narragansett Tribal Council voted to sell virtually all of its remaining 927 acres of tribal land and, in 1880, the Rhode Island General Assembly passed legislation abolishing tribal authority and tribal relations, declaring tribal members citizens, ending the State's relationship with the Tribe and authorizing the sale of tribal lands. The proceeds of the land sale were to be distributed to individual members. Recommendation at 4. That legislation was passed "by consent and agreement with the recognized representatives of [the Tribe]." *In re Narragansett Indians,* 40 A. at 363.

In 1934, Congress passed the IRA, which was designed to reverse a prior federal policy of allotting federal reservations to individual Indians in severalty, thereby abolishing pre-existing federal Indian reservations. The purpose of the IRA, discussed *infra*,

[1] As such, over 70 years later – at the time of passage of the IRA – and at the time of the trust application in 1999, there were no remaining Narragansett Indians who met the half-blood quantum requirement contained in Section 479 of the IRA as discussed below.

was to return a land base to those tribes that lost or could have lost land through allotment; namely, those tribes that were previously federally recognized and under federal jurisdiction at the time of the Act.

At the time the IRA was passed in 1934, the Narragansett Indian Tribe – like a number of other Indian tribes in New England – was neither recognized nor under the jurisdiction of the federal government. As this Court noted,

> In some of the old states, Massachusetts, Connecticut, Rhode Island and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self government, the laws of the state have been extended over them, for the protection of their persons and property.

*Worcester v. Georgia*, 31 U.S. 515, 580 (1832).

The legal fact that the Narragansett at the time of IRA passage were neither federally recognized nor under federal jurisdiction was affirmed in crystal clear language by the Secretary both before and after passage of the IRA. In 1927, some seven years before passage of the 1934 Act, the Indian Affairs Office addressed the question of whether the Tribe was under federal jurisdiction. Tribal leader John Noka sent a letter dated April 25, 1927 to the federal Commissioner of Indian Affairs, in which he "request[ed] the Federal Government to take charge of the affairs

of the Narragansett Indians." On May 5, 1927, the Assistant Commissioner responded that:

> The Narragansett Indians are and have been under the jurisdiction of different states of New England. The Federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs. . . . [A]ll communications in regard to your affairs should be taken up with the proper state officials.

J.A. 20.

The Assistant Commissioner, in a letter dated June 29, 1927, took the same position in another letter to Tribal leader Daniel Sekater. J.A. 21. Again on July 19, 1927, the federal government returned to Mr. John Noka a list he provided of Narragansett Indians, again repeating that "[t]he Narragansett Indians are not under the jurisdiction of the Federal Government, and the list is being returned to you for submission to the proper state authorities." This letter is attached in an Addendum at Tab 5 to Appellants' Joint Memorandum of Law filed in the First Circuit on February 6, 2004. Three years later, on January 11, 1930, the Commissioner of Indian Affairs reiterated:

> Under date of June 29, 1927, you were advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never

> provided any authority for the various Departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of the different states of New England.
>
> You were further advised that there is no possible way in which this Office could furnish the Narragansett Tribe with any assistance and that all matters in regard to their affairs should be taken up with proper state officials.

Appellants' Joint Memorandum of Law, Addendum at Tab 5.

The historical conclusion and position of the BIA remained the same in correspondence three years after passage of the 1934 Act. In a letter from the Indian Affairs Office to Rhode Island Congressman O'Connell dated March 18, 1937, the Commissioner, who at that time was John Collier, replied:

> We have had correspondence directly with Mr. Daniel Sekater relative to this matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe any assistance.

> *The situation has not changed since the above mentioned letter was written.*

J.A. 22 (emphasis added).

Commissioner Collier not only authorized this letter on behalf of the Indian Affairs Office, but did so just three years after he penned the pre-enactment change to the IRA changing inclusion in the IRA from all "recognized Indian tribe[s]" to those "now under Federal jurisdiction." *See Hearings before the Senate Committee on Indian Affairs,* 73d Cong. 2d Sess., part 2, at 264-66 (1934). The Commissioner of Indian Affairs and the author of the provision of the IRA at issue in this case viewed the enacted IRA as *not* applying to the Narragansett Indian Tribe – absent express authority provided by Congress in separate legislation.[2]

Separate legislation for the Tribe was passed by Congress in 1978 in the form of the Settlement Act. That Act, however, and its subsequent amendment in 1996, not only refused to include the Tribe in the IRA or provide independent trust-taking authority – as explained below, it affirmatively extinguished the Tribe's claim to aboriginal title and any Indian rights or interests in land in Rhode Island.

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[2] As shown below, Felix S. Cohen, then Assistant Commissioner of Indian Affairs and later the author of the seminal treatise on Indian law, came to the same legal conclusion as Commissioner Collier with respect to the inapplicability of the IRA to Indian tribes not recognized and under federal jurisdiction at the time the IRA was passed.

In 1975, the Tribe sued the State, the Town and some Charlestown land owners to recover 3,200 acres based upon ancient aboriginal title to the Tribe's former colonial domain (the "Lawsuits"). The Tribe alleged that the 1880 sale of its aboriginal land was without congressional approval as required by the Indian Trade and Intercourse Act of 1790, 25 U.S.C. § 177 (commonly referred to as the Nonintercourse Act) and that, accordingly, the sale was null and void. Complaint in *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.,* at ¶¶ 11-12. A copy of the Complaint is attached to the Plaintiffs' Joint Motion for Summary Judgment filed in the United States District Court for the District of Rhode Island on February 15, 2002 at *Exh. A*. The 31-acre housing site that is the subject of this litigation (the "Parcel")[3] was part of the 3,200 acres over which the Tribe asserted aboriginal title in the Lawsuits. *Carcieri v.*

[3] Trust is not necessary to fulfill Narragansett housing plans for the Parcel, which is owned by a nonprofit corporation (and thus is not subject to property taxes). Moreover, the housing can be and has already been permitted in accordance with state law and town ordinance. There also is no law or regulation requiring the subject Indian housing to be on land held in trust.

Likewise, the inapplicability of the 1934 Act has no impact on the Tribe's right to any of the other federal programs for which the Tribe is eligible because of its federal recognition in 1983. The Tribe receives substantial funding each year under federal programs, including those for tribal health care, social services, housing, natural resources, historic preservation, policing, vocational training, and child care. *See* www.narragansett-tribe.org/programs.htm (discussing programs).

*Norton,* 290 F. Supp. 2d 167, 170-71 (D.R.I. 2003). Pet. App. 86.

In 1978, the parties settled the Lawsuits and entered into a Joint Memorandum of Understanding ("JMOU") signed by the State, the Tribe, the Town and individual landowners. The JMOU is reprinted in the Joint Appendix ("J.A.") at 24-37. The essential structure of the deal called for the establishment of a state chartered corporation (the "State Corporation") for the purpose of "acquiring, managing and permanently holding" 1,800 acres within the Tribe's historic domain, 900 acres of which was to be donated by the State, with the remainder to be purchased with federal funds appropriated for the purpose (collectively referred to as the Settlement Lands). JMOU at ¶¶ 1, 5. J.A. 24-25. The Parcel, although claimed in the Lawsuits, did not become part of the Settlement Lands; it was separately purchased by the Tribe's housing authority in fee simple many years later, and is separated from the Settlement Lands by a town road. *Carcieri v. Kempthorne,* 497 F.3d 15, 23 (1st Cir. 2007). Pet. App. 12.

The Settlement Lands were to be held in trust by the State Corporation for the benefit of the descendants of the 1880 Roll, JMOU at ¶ 8, and, with minor exceptions not relevant here, were to be subject to the "full force and effect" of State laws. JMOU at ¶ 13. J.A. 26-27. For its part, the Tribe agreed that federal legislation would be obtained that "eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island," JMOU at ¶ 6, and agreed to dismiss the Lawsuits

with prejudice upon the effective date of that legislation. JMOU at ¶ 19. J.A. 25, 28.

Ultimately, Congress blessed the parties' agreement by passing the Settlement Act. Under the terms of the Settlement Act, the State was required to enact legislation creating a state-chartered corporation "to acquire, perpetually manage and hold the settlement lands," governed by a board of directors selected by the Tribe and the State. 25 U.S.C. §§ 1706(a)(1), (2). Elsewhere in the Settlement Act, Congress required that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). Congress also extinguished the Tribe's aboriginal title to land throughout Rhode Island, 25 U.S.C. §§ 1705(a)(2); 1712(a)(2), and separately extinguished the Tribe's (or any successor in interest to the Tribe) ability to make any "claims" "based upon any interest in or right involving" land in Rhode Island. 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). Finally, Congress discharged the United States from any "further duties or liabilities under the [Settlement Act] with respect to the [Tribe], the State Corporation, or the Settlement Lands." 25 U.S.C. § 1707(c).

The Tribe received federal recognition in 1983. Final Determination for Acknowledgement of Narragansett Indian Tribe of Rhode Island. 48 Fed. Reg. 6177 (1983). *Carcieri,* 497 F.3d at 23. Pet. App. 11. In 1985, the Rhode Island General Assembly terminated the State Corporation, transferring the Settlement Lands to the Tribe and passing the duties and liabilities of the

State Corporation with them. R.I. Gen. Laws §§ 37-18-12, 13 and 14. Several years later, the Tribe deeded the Settlement Lands to the United States to be held in trust. *Carcieri v. Kempthorne,* 497 F.3d at 23. Pet. App. 12. The United States accepted the Settlement Lands in restricted trust only, expressly recognizing the continued "applicability of state laws conferred by the Rhode Island Indian Claims Settlement Act." Deed Conveying the Settlement Lands from the Narragansett Indian Tribe to the United States in Trust. J.A. 41.

### C. Proceedings Below

1. On March 6, 1998, the BIA notified the Governor and the Town that the Secretary intended to take the Parcel into federal trust for the Tribe without restriction pursuant to Section 465 of the IRA. *Carcieri,* 497 F.3d at 24. Pet. App. 14. Because the proposed trust acquisition would have resulted in an ouster of the State's civil and criminal laws and jurisdiction from the Parcel in favor of a federal and tribal jurisdictional regime – a jurisdictional first given that there has never been any sovereign territory for any Indian tribe in Rhode Island since statehood – the Governor and the Town immediately appealed. The Interior Board of Indian Appeals ("IBIA") affirmed the Secretary's decision to convert the Parcel to trust. J.A. 46-68.

2. The IBIA decision was, in turn, appealed to the United States District Court for the District of Rhode Island. There, the Petitioners argued, *inter*

*alia,* that the Secretary was prohibited from converting land to trust for the Tribe under the IRA. First, by its own terms, the IRA is temporally limited to those tribes both federally recognized and under federal jurisdiction in 1934; since the Tribe was neither recognized nor under federal jurisdiction then, the Secretary could not convert land to trust for their benefit under the IRA. Second, the Settlement Act independently precludes trust conversions by the Secretary for Indians in Rhode Island by extinguishing aboriginal title and all Indian claims "based upon any interest in or right involving" land in Rhode Island. The District Court rejected both arguments and entered final judgment in favor of the Secretary. *Carcieri,* 290 F. Supp. 2d 167. Pet. App. 84-136.

3. The Governor, State and Town appealed the District Court's final decision to the United States Court of Appeals for the First Circuit pursuant to 28 § U.S.C. 1291. There, a three-judge panel held that the Secretary could take land into trust for the Tribe in Rhode Island, but declined to reach the issue of whether lands so converted remain subject to the State's civil and criminal laws and jurisdiction. *Carcieri v. Norton,* 398 F.3d 22 (1st Cir. 2005). The State petitioned for a rehearing asserting that the panel had failed to reach the central issue of the case: jurisdiction. Supplemental briefing was ordered by the full court and, on September 13, 2005, the court ordered the three-judge panel to rehear the case. The panel opinion was withdrawn and the judgment vacated. Order of September 13, 2005. Pet. App. 137-38.

The three-judge panel issued another decision which rejected the State's arguments, permitted the Secretary to take the Parcel into unrestricted trust and determined that the Parcel would be subject to federal and tribal law, rather than state law. This time, Judge Howard dissented, arguing that the extinguishment provisions of the Settlement Act encompassed all Indian sovereignty claims, including those arising from trust. *Carcieri v. Norton,* 423 F.3d 45, 71-72 (1st Cir. 2005) (Howard, J., dissenting) (rehearing opinion). The Governor, State and Town petitioned for en banc rehearing. The full court granted the petition, the rehearing opinion was withdrawn, and the judgment based thereon once again vacated. The parties (as well as the scores of amici that were, by then, involved in the case) were permitted to file another round of supplemental briefs and the case was reheard, en banc, on January 7, 2007. Order of December 5, 2006. Pet. App. 139-41.

The full court then issued a 4-2 decision, affirming the Secretary's ability to take land into trust for the Tribe. The court, noting that "[t]he State's challenges to the Secretary's authority under the IRA and the Constitution have national implications that reach beyond Rhode Island," rejected each of the State's defenses to the Secretary's trust acquisition. *Carcieri v. Kempthorne,* 497 F.3d 15, 21 n.2 (1st Cir. 2007) (en banc). Pet. App. 7-10. It determined that the "recognized in [1934] tribe" limitation contained in Section 465 of the IRA is "ambiguous" and, having injected ambiguity, accorded the Secretary complete

deference in construing the 1934 Act as applying to any and all federally recognized tribes, regardless of the date of recognition. *Id.* at 26-35. Pet. App. 19-37.

On the State's argument that the later-enacted Settlement Act's extinguishment of aboriginal title and Indian claims based upon rights or interests in land separately prohibited Indian territorial sovereignty, the court was sharply divided. Both the majority and the dissenters agreed on the obvious – that the Secretary's acquisition will divest the State of fundamental aspects of its sovereignty over land so acquired, while at the same time granting the Tribe broad territorial sovereignty there. With scant analysis, however, the four-judge majority concluded that the Settlement Act did not prohibit the ouster of state sovereignty and the concomitant imposition of Indian sovereignty that are the hallmarks of trust. In the majority's view, Indian claims of sovereignty over land simply are not the type of claims extinguished by Congress in the Settlement Act. *Id.* at 34-39. Pet. App. 37-50.

Specifically, the majority held that "[t]rust acquisition is not incompatible with the extinguishment of aboriginal title" because the extinguishment of aboriginal title merely eliminated one "form of title." *Id.* at 36. Pet. App. 42-43. In the majority's view, the Settlement Act's elimination of this one form of Indian title did not preclude the reestablishment of tribal sovereignty over land by "alternative means," such as the conversion of land to trust under the IRA. *Id.* at 36. Pet. App. 42. In other words, other forms of

title could still be established in Rhode Island that would yield the same sovereignty allocation between the Tribe and the State as aboriginal title, so long those forms are not called "aboriginal title."

The majority went on to hold that the "all Indian claims" extinguishment further eliminates "claims based on *other forms of title,* besides aboriginal title. . . ." *Id.* Pet. App. 43 (emphasis added). Yet, despite this conclusion, it failed to read the "all Indian claims" extinguishment as eliminating claims based on one particular "other form of title" – trust title. Instead, it narrowly confined the scope of the "all Indian claims" extinguishment to "traditional property claims" that did not extend to Indian claims of sovereign authority over land. *Id.* Pet. App. 43.

Finally, the majority held that Petitioners' argument concerning the Settlement Act's restrictions on the Tribe's ability to regain territorial sovereignty "misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." *Id.* Pet. App. 44. The majority concluded that whatever restrictions on the establishment of sovereignty Congress placed on the Tribe's ability to establish territorial sovereignty in Rhode Island, such restrictions do not bind the Secretary when he reestablishes sovereign control over territory for the Tribe.

The dissenters, by contrast, rejected the majority's "wooden" reading of the Settlement Act, *id.* at 51, Pet. App. 79 (Selya, dissenting), and viewed the

extinguishment provisions broadly. Citing to the congressional record, they argued that Congress intended to extinguish claims raised by "Indians qua Indians" and that the ouster of state jurisdiction over land and the establishment of Indian territorial sovereignty there are *quintessential* Indian land claims. *Id.* at 49. Pet. App. 74-75 ("It is beyond peradventure that asking to have land taken into trust by the BIA under the IRA to effect an ouster of state jurisdiction is a quintessential 'Indian' land claim.") (Howard, dissenting). Judge Howard's dissent also noted the "exquisite irony" of the majority's opinion. While acknowledging that in the heart of its historic domain, the Tribe is fully subject to state laws and jurisdiction, the opinion nevertheless authorizes the Secretary to establish sovereign territory for the Tribe everywhere else. *Id.* at 49-50. Pet. App. 75-76.

Shortly after the en banc decision was issued, the State filed a Motion for a Stay of Mandate. Recognizing the impact of the case, both in Rhode Island and nationwide, the First Circuit stayed its mandate "pending resolution of the petition by the United States Supreme Court." Pet. App. 82-83.

## SUMMARY OF ARGUMENT

Two acts of Congress preclude the Secretary from taking land into trust in Rhode Island for the Narragansett Indian Tribe. First, the IRA – enacted in 1934 – authorizes land to be taken into trust only for "any

recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). As every court to have construed the provision has concluded – until the First Circuit's opinion below – "now" means "now," not "later" or "now or hereafter." This Court's opinion in *United States v. John,* 437 U.S. 634 (1978) acknowledging the IRA's "recognized [in 1934] tribe" limitation, other provisions of the IRA, its legislative history and purpose, as well as the federal government's own contemporaneous position all make that clear. The IRA does not authorize the Secretary to take land into trust for an Indian tribe, like the Narragansett, that was neither federally recognized nor under federal jurisdiction until decades after the IRA's passage.

Second, the Settlement Act expressly extinguished all aboriginal title in Rhode Island and further extinguished all Indian claims based on interests in or rights involving land in Rhode Island. Allowing the Secretary to convert the Parcel to trust under the IRA violates the Settlement Act's extinguishment because trust reestablishes the fundamental and defining attributes of the aboriginal title estate. A trust conversion also violates the Settlement Act's broader extinguishment of all Indian claims involving land because trust gives rise to the quintessential Indian land claim – the exercise of territorial sovereignty to the exclusion of state laws.

Not only does converting land to trust violate the express extinguishment provisions of the Settlement Act, it also violates the intent of the parties in settling

the Lawsuits and the intent of Congress in ratifying that settlement. All sought to eliminate every Indian claim to land in Rhode Island, including those claims that can be made uniquely by Indian tribes, like claims to sovereign authority over land.

## ARGUMENT

### I. THE INDIAN REORGANIZATION ACT APPLIES ONLY TO THOSE INDIAN TRIBES THAT WERE BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934

The First Circuit held that the IRA applies to a Tribe neither federally recognized nor under federal jurisdiction in 1934. It did so on the ground that the applicable statutory test is "ambiguous" and therefore that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was "permissible" for the Secretary to interpret "now" when used by Congress in 1934 to mean not only at the time of passage of the IRA, but also at any point in the future.[4] *Carcieri,* 497 F.3d at 30. Pet. App. 29.

In declining to temporally limit the IRA to tribes that were both federally recognized and under federal

[4] As this Court also held in *Chevron*, where Congress has plainly expressed its intent "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent." 467 U.S. at 842-43. It is that part of *Chevron* that controls here.

jurisdiction in 1934, the First Circuit committed clear legal error. Its conclusion is in direct conflict and/or inconsistent with: 1) the plain and unambiguous language of the IRA; 2) this Court's conclusion in *United States v. John*, 437 U.S. 634 (1978), which interpreted Section 479 of the IRA as setting forth a "recognized [in 1934] tribe" test for tribal inclusion; 3) the IRA's purpose and legislative history; and 4) the federal government's contemporaneous interpretation of the IRA, which it followed for decades after passage, taking not a single acre into federal trust for a newly recognized tribe.

### A. The Plain and Unambiguous Language of the IRA Precludes the Secretary from Taking Land into Trust for the Narragansett Indian Tribe

The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. For the purpose of Section 465:

> [t]he term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all of the persons of

> one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. § 479 (emphasis added).

It is surpassingly clear that when Congress uses the word "now" as an eligibility criterion for inclusion in a statute in the way Congress does in the IRA, it means on the date the statute is enacted. While the Secretary argued in opposition to certiorari that "now" should mean "at a later time," *see Cert. Opp.* at 7, this Court has never so held. On the contrary, in *Montana v. Kennedy*, this Court held that the plain meaning of the word "now" is to temporally limit application to persons who meet the statutory test "on . . . the effective date of the . . . statute," and "had no prospective application." 366 U.S. 308, 310-11 (1961).

When Congress wished to include events subsequent to passage of the IRA it did so expressly. Section 472 of the IRA, for example, applies to employment positions maintained "now *or hereafter*." (emphasis added). The absence of the words "or hereafter" in Section 479 precludes an interpretation that effectively reads those words into that section. At the time of the passage of the 1934 Act and to the present day, Congress had at least three ways to include the Tribe within its purview. It could have omitted or deleted "now" from Section 479, it could have added "or hereafter" to the definition, or it could

have (as it did with other tribes) later passed a law specifically authorizing trust for the Narragansett.

Indeed, on numerous occasions since 1934, Congress has passed specific acts including additional tribes within the scope of the IRA or granting them trust land.[5] While Congress has amended the 1934 Act numerous times to include specific additional tribes from certain states that were not then recognized or under federal jurisdiction, it has declined to amend the definitional section of the 1934 Act to remove the general temporal limitation on its application – a limitation referred to by the bill's cosponsor as its "status quo" provision. The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is inconsistent with the position of the Secretary that all tribes, regardless of the date of recognition, are automatically included in the IRA as soon as they become federally recognized. While Congress subsequently passed numerous laws providing financial aid and other benefits to tribes, including the Narragansett, recognized after 1934, the IRA does not apply to later recognized tribes.

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[5] *See*, *e.g., Hoopa-Yurok Settlement Act*, Pub. L. No. 100-580 (1988) ("The Indian Reorganization Act of June 18, 1934, as amended, is hereby made applicable to the Yurok Tribe . . . "); *Coquille Restoration Act*, Pub. L. No. 101-42 (1989) ("Indian Reorganization Act Applicability. The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members."). Although Congress passed two specific laws for the Narragansetts (the Settlement Act in 1978 and an amendment to the Act in 1996), it has never added them to the scope of the IRA.

Finally, Section 478 of the IRA required the Secretary to call for an election by existing reservation Indians on whether to opt out of the IRA "within one year of June 18, 1934," not within a year of some future recognition of a tribe or reservation. The plain language is entirely inconsistent with the notion that the IRA applied to tribes not then recognized and under federal jurisdiction. *See City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) ("That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

The briefs of the Governor and the State discuss in even more detail additional language and history of the IRA that limits its application as a matter of law and logic only to those Indian tribes both recognized and under federal jurisdiction in 1934. Rather than repeat those powerful points here, the Town joins and incorporates them by reference.

### B. This Court (and Two Circuit Courts) Have Already Interpreted the IRA to Contain a "Recognized [in 1934] Tribe" Limitation

In *United States v. John*, this Court set forth the applicable statutory test necessary for a tribe (in that case the Mississippi Choctaw), to be included in the IRA as follows:

1) "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction," or

2) "all other persons of one-half or more Indian blood."[6]

437 U.S. at 649 (bracket by Court).

When it decided *John*, this Court was keenly aware of an earlier Fifth Circuit opinion, *United States v. State Tax Comm'n*, also involving the Choctaw, which squarely held that: "The language of [25 U.S.C. §479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words '*any recognized Indian tribe now under Federal jurisdiction*' and the additional language to like effect." 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original).

The First Circuit dismissed *John* in a single paragraph: referring to *John's* discussion of the question presented here as "musings" which "fall

[6] Immediately after citing Section 479, this Court further confirmed the temporal limitation of the Act, stating that "[t]here is no doubt that persons of this description [half bloods] lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior *at the time the Act was passed*." 437 U.S. at 650 (emphasis added). This separate "Indian blood" test for IRA inclusion is not at issue in this case. The Secretary has proposed to take the Parcel into trust "for the use and benefit of the Narragansett Indian Tribe of Indians of Rhode Island," and not individual Indians. App. 162. Unlike the Choctaw, the Narragansett have never claimed that tribal members today or at the time the 1934 Act was passed met the half-blood test.

short of even being dicta." 497 F.3d at 28. Pet. App. 22-23. *John*, however, cannot be so cavalierly discarded. The First Circuit correctly notes that *John* was decided on a "different clause" for IRA eligibility; namely, that the Choctaw Tribe included members "of one-half or more Indian blood," and not on the ground that the tribe qualified under Section 479's inclusion regardless of the date it was recognized by the federal government. 497 F.3d at 27-28. Pet. App. 22. That, however, hardly makes this Court's conclusion on Section 479's temporal limitation dicta or worse. That is because nowhere in *John* did this Court express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in *Tax Comm'n,* that the language of Section 479 "positively dictates that tribal status is to be determined as of June, 1934." 505 F.2d at 642. To the contrary, this Court itself affirmed Section 479's temporal limitation by expressly noting the "recognized [in 1934] tribe" requirement.[7]

By not reversing the Fifth Circuit's earlier conclusion that the 1934 Act was temporally limited to certain tribes, and resting its reversal on an unrelated alternative ground, this Court's interpretation

[7] As such, if no member of the Choctaw Tribe possessed one-half or more Indian blood at the time of passage of the Act, this Court would have properly concluded that: 1) a "recognized in [1934] tribe test" was contained in Section 479; and 2) the Choctaw Tribe did not pass that test. That same conclusion applies to the Narragansett here.

of Section 479 – while arguably falling short of an outright holding – is in no way mere "musings" or an interpretation that "falls short of even being dicta." 497 F.3d at 28. App. 23. This Court's conclusion that a "recognized [in 1934] tribe" test exists in the 1934 Act – like that of the Fifth Circuit[8] – has sustained precedential value and should be reaffirmed by this Court.

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[8] The Ninth Circuit has also weighed in on the question of whether the 1934 Act contains a temporal limitation. After a detailed discussion of the text and history of Section 479, the District Court interpreted the "recognized [in 1934] tribe" test as a clear temporal limitation:

> [T]he definition of "Indian within the IRA states that it "include[s] all persons of Indian descent *who are members of any federally recognized Indian tribe* ***now*** *under* ***Federal jurisdiction*** *and all persons who are descendants of such members who were, on June 1, 1934 . . . and shall further include all other persons of one-half or more Indian blood.* 25 U.S.C. § 479 [emphasis by court]. This definition was intended to preserve the status quo with respect to who should be considered an Indian.

*Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1221 n.10 (D. Haw. 2002) (emphasis in original), *aff'd by* 386 F.3d 1271, 1281 (9th Cir. 2004) ("by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. There were no *recognized* Hawaiian Indian tribes *under federal jurisdiction in 1934*, nor were there any reservations in Hawaii."). This Court denied certiorari. 545 U.S. 1114 (2005); *see also* Elmer Rusco, A Fateful Time: The Background and Legislative History of the IRA, 267 (UNLV Press 2000) (definitional section of IRA applies to all persons of Indian descent who are members of any recognized tribe under federal jurisdiction as of June 1934).

### C. The Purpose and Legislative History of the IRA Fully Support the Temporal Limitation

Allowing IRA trust for the Narragansett is inconsistent with the purpose and legislative history of the IRA. This Court has "recognized that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land." *Kahawaiolaa*, 222 F. Supp. 2d at 1221 n.10 citing *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 n.1 (1989). There was never a federal Indian reservation in Rhode Island and Indian land here was never subject to federal allotment. Thus, the goal of IRA – to reverse federal allotment policy and put back together former federal reservations – is not applicable in Rhode Island.[9]

The history of the temporal limitation shows that the chairman of the congressional committee considering the IRA wished to preserve the status quo by including only Indian tribes then presently under federal jurisdiction. There were certain "so-called" tribes in northern California who were apparently under the "supervision" of the federal government. *Hearing Before the Senate Committee on Indian Affairs* 73d Cong., 2d Sess., part 2 at 266 (1934). The chairman

[9] That the Tribe may have lost land in other ways does not mean the remedial provisions of the IRA must or should apply. Indian claims to regain historic land in Rhode Island were addressed by Congress with the consent and participation of the Tribe, the State and the Town in the 1978 Settlement Act.

did not believe they should be covered by the IRA. At that point, the legislation placed no temporal limitation after the words "recognized Indian tribe." Commissioner of Indian Affairs John Collier suggested that the way to ensure that these tribes were out of the IRA was to limit the inclusion of "recognized Indian tribe[s]" to those "now under Federal jurisdiction." *Id.*

Commissioner Collier was the author of the "now under federal jurisdiction" amendment to the IRA. He proposed this language precisely to prevent new tribes from coming within the IRA's scope. Responding to concerns from senators that tribes that were not bona fide could come within the IRA under the draft definition of "Indian" ("include[s] all persons of Indian descent who are members of any recognized Indian tribe," and all others of one-fourth or more Indian blood) (*Senate 1934 Hearings* at 264), the Commissioner offered the following temporal limitation:

> Would this not meet your thought, Senator: After the word "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

*Hearing Before the Senate Committee on Indian Affairs* 73d Cong., 2d Sess., part 2 at 266 (1934).

Commissioner Collier's proposed amendment was incorporated into the IRA and the cosponsor of the IRA, Senator Edgar Howard, explained to Congress that the amended definitional section "recognizes the status quo of the present reservation Indians and further includes all persons of one quarter Indian blood." *Kahawaiolaa*, 222 F. Supp. 2d at 1221 n.10 (quoting Congressional Debate on the Wheeler-Howard Bill 1973 (1934) in 3 *The American Indian and the United States* (Wilcomb E. Washburn ed. 1973)), *aff'd* 386 F.3d 1271 (9th Cir. 2004). There is thus no doubt that the Commissioner's addition of the temporal limitation was intended to and did exclude the "tribes" at issue from the IRA.

### D. The Government's Contemporaneous Interpretation of the IRA and its Decades-Long Implementation Are Consistent With the Temporal Limitation

Three years after his amendment was incorporated into the IRA, Commissioner Collier had the occasion for his office to apply the temporal limitation to the Narragansett Indian Tribe. Seeking federal help, between 1927 and 1937 the Narragansett asked the Office of Indian Affairs for monetary and other assistance. J.A. 20-23. In a pre-IRA letter, the office "advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage

their affairs." J.A. 20. Then, after passage of the IRA, the Tribe asked again for assistance. Referring to his office's prior letters, the Commissioner concluded in 1937 that: "The situation has not changed since the above mentioned letter was written." J.A. 22.

Collier's then-Assistant, Felix S. Cohen, reached the same legal conclusion that the IRA did not apply to tribes that were not recognized and under federal jurisdiction at the time of the Act. Within a year after the IRA passed, Cohen wrote a memo to Collier addressing whether a tribe not under federal jurisdiction at the time of its passage was covered under the 1934 Act. Cohen's answer was no, stating that: "Clearly, this group [Siouan Indians of North Carolina] is not a 'recognized Indian tribe now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one-half or more Indian blood."[10] Department of the Interior

[10] Cohen went on to explain how Indians of one-half or more blood could come under the IRA. Indeed, the banding together of Indians of half-blood or more is how the Mississippi Choctaw were deemed by this Court to be IRA eligible. *John,* 437 U.S. at 650, n.19 (noting "that approximately 85 percent of this group are full bloods"). Here, the application for trust was made solely on behalf of the Narragansett Indian Tribe and more importantly, unlike the Choctaw, no tribal member claims half-blood status now or as of 1934.

Memorandum from Cohen to Collier dated April 8, 1935 (Obtained from Collections of the Manuscript Division, Justice Blackmun Papers on *U.S. v. John*, Library of Congress).

In short, John Collier, the author of the amendment creating the temporal limitation in Section 479, who was also the Commissioner of Indian Affairs during the IRA's passage, as well as Assistant Commissioner Felix S. Cohen, both agreed with the plain reading of Section 479 put forth by the Petitioners in this case.

It is thus not surprising that the federal government itself took no action contrary to the legal conclusion of Collier and Cohen for at least the first 40 years after passage of the IRA. In 1975, the Bureau of Indian Affairs commissioned a report entitled "Report on the Purchase of Indian Land and Acres of Indian Land in Trust 1934-1975" Appendix A3, *microformed at* Suffolk Univ. Sch. of Law, Microforms Drawer 162, Title 3322 (the "BIA Indian Trust Lands Report" or "Report"). The Report details the trust acquisitions made by the BIA under Section 465 of the IRA for specific tribes during three periods: 1934-46; 1946-56; and 1956-75. A copy of Appendix A3 of the Report is attached as Exhibit A to State Appellants' Response to Amici filed in the First Circuit on August 31, 2005. All of the trust acquisitions detailed therein are for tribes that were federally recognized and under federal jurisdiction in 1934. Indeed, virtually every tribe listed in the Report for whom the BIA took land into trust during this period also appears on the

Department's own list of IRA-eligible tribes published by the Department in 1946. *See* Theodore H. Hass, Ten Years of Tribal Government Under I.R.A., at http://thorpe.ou.edu/IRA/ IRAbook.[11]

Thus, the BIA's own documents indicate that from 1934 until 1975, Secretaries of the Interior converted land to trust under the IRA exclusively for those tribes that were federally recognized and under federal jurisdiction in 1934.[12] In 1980, the Secretary had no dispute with the plain reading of Section 479 as including a temporal limitation "granting this point arguendo . . . and nowhere attempting to refute it." *City of Sault Ste. Marie*, 532 F. Supp. at 161 n.6.

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[11] In order to determine which tribes were eligible to opt out of the 1934 Act, the Secretary had to determine which tribes were *in* the Act. Therefore, "a list of 258 tribes was made of all those eligible to participate in voting to reorganize under the IRA or not. As a practical matter, this list can be said to be the constructive 'list' of Indian tribes recognized by the United States in 1934." William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept,* 34 Am. J. Legal Hist. 331, 356 (1990); *see also* Theodore H. Hass, *Ten Years of Tribal Government Under I.R.A.*, Table A at http://thorpe.ou.edu/IRA/IRAbook, (Interior-commissioned report detailing which tribes voted to accept or reject the IRA with election dates). The contemporaneous creation of such a list by the Secretary of IRA eligible tribes is inconsistent with his position here that every recognized tribe is eligible.

[12] Since the 1970s, with at most one or two exceptions, the Department has converted land into trust for non-1934 Act tribes only pursuant to a separate settlement or other act of Congress specifically authorizing the trust conversion.

Moreover, in 2002 the Secretary did not argue against the District Court of Hawaii's conclusion in *Kahawaiolaa*, 222 F. Supp. 2d 1213, concluding that the IRA was temporally limited. The historic interpretation of the government upon passage of the IRA and years of action consistent with that interpretation belies the Secretary's newly-hatched position in this case.

## II. THE SETTLEMENT ACT BARS THE SECRETARY FROM CONVERTING THE PARCEL TO TRUST

Allowing the Secretary to convert the Parcel to trust under the IRA violates the Settlement Act's extinguishment of aboriginal title because such a conversion reestablishes all of the fundamental and defining incidents of the aboriginal title estate. The trust conversion also violates the Settlement Act's broader extinguishment of all claims based upon Indian interests in or rights involving land in Rhode Island because trust gives rise to the quintessential Indian claim involving land – a claim of right to exercise tribal territorial sovereignty to the exclusion of state laws.

Not only does converting land to trust violate the express extinguishment provisions of the Settlement Act, it also violates the intent of the parties in settling the Lawsuits and the intent of Congress in ratifying that settlement. All sought to eliminate every Indian claim to land in Rhode Island including, of course, those claims that could be made uniquely

by Indian tribes, like claims to sovereign authority over land.

### A. Congress Abolished Indian Territorial Sovereignty in Rhode Island

#### 1) The Settlement Act extinguished all aboriginal title in Rhode Island

Congress has the absolute right to extinguish aboriginal title. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955) (power of Congress to extinguish aboriginal title is supreme); *see also United States v. Wheeler*, 435 U.S. at 313, 323 (1978) (tribal sovereignty – whether land based or membership based – "exists only at the sufferance of Congress and is subject to complete defeasance.").

There is no question that Congress has effected a wall-to-wall extinguishment of aboriginal title in Rhode Island. In section 1705 of the Settlement Act, Congress retroactively approved all prior land transfers from the Narragansett Indian Tribe anywhere within the United States and extinguished Narragansett aboriginal title to that land. 25 U.S.C. § 1705(a)(1), (2). Congress also retroactively approved all prior land transfers from any other Indian tribes within Charlestown and extinguished other Indian tribes' aboriginal title to land in Charlestown. *Id.* In section 1712 of the Settlement Act, Congress retroactively approved all prior land transfers from other Indian tribes within Rhode Island but outside Charlestown and extinguished all other Indian tribes'

aboriginal title to that land. 25 U.S.C. §§ 1712(a)(1), (2). In this way, Narragansett aboriginal title was extinguished nationwide and all other tribes' aboriginal title was extinguished within the borders of Rhode Island.

### 2) Aboriginal title is an Indian estate in land with territorial sovereignty as a defining incident

While the First Circuit rightly determined that the Settlement Act extinguished aboriginal title throughout Rhode Island, it failed to recognize the essential nature of the aboriginal title estate. As a result, it greatly diminished the scope of Indian interests divested by an extinguishment of that estate. In essence, the First Circuit reduced aboriginal title to a "traditional" (read fee simple) property interest, 497 F.3d at 36, Pet. App. 43, and thereby limited the Settlement Act's extinguishment provisions to "merely resolving the claims that had clouded the titles of so much land in Rhode Island. . . . " *Id.* at 35. Pet. App. 40. Properly read, however, the Settlement Act's extinguishment of aboriginal title does more than just clear the title of private property owners. It also prohibits the creation of tribal territorial sovereignty in Rhode Island, whether through trust or otherwise.

Aboriginal title describes a *sui generis* set of rights and interests in land having little in common with "traditional" property ownership. Felix S. Cohen,

Handbook of Federal Indian Law 472 (Rennard Strickland ed. 1982) (discussing the tribal estate as a unique form of collective property ownership with no known analog in Anglo-American property law). Although Indian tribes holding land by aboriginal title enjoy full beneficial use of that land, they do not possess legal title to it. Instead, the ultimate legal title to aboriginal land is held by the sovereign. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). Land held by tribes under aboriginal title cannot be alienated without the consent of the United States. 25 U.S.C. § 177; 414 U.S. at 667-68 (Indian tribes may not freely alienate land they hold under aboriginal title); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (Indian tribes' power to "dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."). Since aboriginal title is not a property interest protected by the Fifth Amendment's takings clause, land so held may be "taken" by the federal government without any constitutional obligation to pay for it. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (aboriginal title lands can be "fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.").

By these measures, aboriginal title is less than a "traditional" fee simple interest in land. In other ways, however, it is more – much more. For almost 200 years, this Court has recognized that Indian

tribes have a significant sovereignty interest in their land. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 690-91 (1993) (Cheyenne Sioux Tribe's unabrogated "right . . . of 'absolute and undisturbed use'. . . . encompass[es] the right to exclude and to regulate"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("This Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."); *Wheeler*, 435 U.S. at 323 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); *Worcester*, 31 U.S. (6 Pet.) at 556-57 ("[f]rom the commencement of our government" Congress has treated Indian tribes as nations and considered them as "distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ."); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574 (Indians holding land under aboriginal title have the right "to use [the soil] according to their own discretion."); *see also* Felix S. Cohen, Handbook of Federal Indian Law § 15.04 [2] at 969 (N.J. Newton et al. eds. 2005) ("Original Indian title, also known as aboriginal Indian title, refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance.").[13]

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[13] That Indian tribes possess a sovereignty interest in their land is recognized by historians and legal scholars alike. *See, e.g.*, William Cronon, Changes in the Land 58 (Arthur Wang ed.

(Continued on following page)

This Court most recently affirmed that the exercise of territorial sovereignty is an inherent attribute of the aboriginal title estate in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). In *Sherrill*, the Oneida Indian Nation purchased fee title to two parcels of land within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to that land, the Oneida argued that its reestablished aboriginal title would allow it to exercise tribal "sovereign dominion" over the parcels. *Id.* at 213.

Crucially, the Oneida were not attempting to use aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida purchased the parcels and owned them in fee. Instead, the sole reason for the assertion of aboriginal title was to extend tribal sovereignty over the parcels by removing them from state jurisdiction (and its

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Farrar, Straus & Giroux 2003) (1983) (discussing New England Indians' conception of real property as including both individual ownership of land and collective sovereignty over territory); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 662 (2003) ("a congressional recognition of tribal property, or a grant of property to a tribe for the purpose of establishing an Indian reservation, presumes not only a recognition of property rights but a recognition of tribal sovereignty within the territory in question. After all, ownership of the land was in the tribe, and the tribe is a political entity that would determine how to use the land by exercising its sovereign regulatory powers and not just its ownership rights.").

concomitant taxing power). If aboriginal title were nothing more than a fee simple interest in land, lacking sovereign jurisdictional import, this Court would have ended the case right there – by holding that aboriginal title was insufficient to insulate the Oneida from taxation. Instead, this Court nowhere disagreed with the Oneida's core position that when an Indian tribe holds both fee title and aboriginal title to land, it owns the land and may exercise "present and future Indian *sovereign* control" over the land. *Id.* at 219-20 (emphasis added). The Oneida lost their bid to regain sovereign control over the parcels not because aboriginal title lacks a sovereignty interest; but rather, because aboriginal title was lost through laches. *Id.* at 216. *Sherrill* thus presumes the fundamental point that aboriginal title – unlike fee title – includes Indian sovereignty over land.

### 3) Trust title is essentially aboriginal title under a different name

The issue presented here is not in whether Congress has totally extinguished aboriginal title in Rhode Island – it clearly has. The question is the legal effect of that complete extinguishment on the Secretary's ability to establish sovereign territory for the Tribe. While the First Circuit dismissed the extinguishment of aboriginal title as irrelevant to the establishment of trust title, 497 F.3d at 35-36, a simple comparison of the aboriginal title estate to the

trust estate demonstrates that, in every important respect, they are the same.

As discussed above, Indian tribes holding land under a claim of aboriginal title do not possess legal title to that land; ultimate title is in the United States. The same is true for trust land. Indian tribes do not possess legal title to trust land; ultimate title is in the United States. 25 U.S.C § 465 ("Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired . . . "). Just as Indian tribes holding land under aboriginal title cannot alienate their land without the consent of the United States, they also cannot alienate trust property without the consent of the United States. 25 C.F.R. 152.22(b) (imposing a blanket restriction on alienation against any tribal lands held in trust by the United States, unless authorized by federal statute and approved by the Secretary). Moreover, just as there is no constitutional obligation to compensate tribes for the seizure of land held by aboriginal title, there is no constitutional obligation to compensate tribes for the taking of trust land. That is because, like aboriginal title land, tribes do not hold the underlying fee to trust land. Of course, as with aboriginal title land, tribes enjoy full beneficial use of trust land even though they do not hold legal title to it. Thus, the tribal possessory interest in aboriginal title land and the tribal possessory interest in trust land is identical.

A tribe's sovereignty interest in aboriginal title land and trust land is, likewise, identical. On trust land – just as on land held under aboriginal title – Indian tribes exercise territorial sovereignty to the exclusion of state laws. *Sherrill*, 544 U.S. at 220-21 (When the Secretary converts land to unrestricted trust for an Indian tribe under Section 465 of the IRA, he "reestablish[es] sovereign authority over territory" for that tribe); *see also Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978) ("When Congress provided in § 465 for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation."). Land converted to unrestricted trust is exempt from state and local taxation. 25 U.S.C. § 465. Indian trust land is also generally exempt from state and local land use regulation. 25 C.F.R. 1.4; *see also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664-66 (9th Cir. 1975) (Congress intended lands held in trust under the IRA to be free of state regulation). In short, when the Secretary converts land to trust for tribes under Section 465 of the IRA, he establishes a land base over which an Indian tribe can exercise territorial sovereignty to the general exclusion of state laws. This is precisely the jurisdictional allocation that exists on land held by tribes under a claim of aboriginal title.

Thus, the essential attributes of aboriginal title and trust title are the same. Both describe a specialized form of occupancy unique to Indian tribes. Both aboriginal and trust estates permit tribes full beneficial use of the land. Neither estate confers fee title ownership on the resident tribe. Tribes cannot freely alienate land held by aboriginal title and they cannot alienate land held in trust; both require the consent of the sovereign. There is no constitutional obligation to compensate land taken from Indians holding either by under aboriginal title or by trust. Yet, both estates are largely exempt from state law and, as a result, provide a locus for tribes to exercise territorial sovereignty subject only to the United States.

#### 4) Where Congress extinguishes aboriginal title, it necessarily prohibits trust

Where Congress extinguishes the aboriginal title estate, no administrative agency can reestablish that estate simply by calling it a different name. When Congress extinguished aboriginal title in Rhode Island, it abolished the prototypical Indian estate. The IRA, by contrast, returns to Indian tribes land lost through allotment and it returns that land, not in fee simple, but in the prototypical Indian estate. There is no difference between the IRA trust estate and the aboriginal estate because Congress intended

the former to replicate the latter.[14] Where Congress extinguishes aboriginal title, therefore, it necessarily prohibits trust conversions under the IRA because aboriginal title and trust title are the same form of land tenure.

The First Circuit did not directly dispute that trust title and aboriginal title operate in the same manner, both endowing an Indian tribe with territorial sovereignty while divesting a state of its jurisdiction by like measure. The First Circuit, however, relying on *Sherrill*, held that "[h]owever aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty over land." 497 F.3d at 36. Pet. App. 42. *Sherrill*, however, involved no post-IRA act of Congress. It merely held that when the Oneida lost sovereign control over its territory through inaction, "standards of federal Indian law and federal equity practice" prevented the Oneida from unilaterally "reviving" that former sovereignty. 544 U.S. at 203, 214 (Oneida may not "rekindl[e] embers of sovereignty that long ago grew cold."). Where the Oneida allowed its sovereignty to lapse and acquiesced to the exercise of state sovereignty instead, this Court stated that "Section 465 [of

[14] As discussed above, the IRA was intended to return land to Indians lost as a result of the federal policy of allotment. It attempted to "reorganize" or put back together the unique tribal relationship to land. As a result, the nature of the title returned to tribes via the IRA replicates, to the greatest extent possible, the land tenure held by tribes prior to allotment.

the IRA] provides the proper avenue for the [Oneida] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221. Thus, *Sherrill* stands for the proposition that where an (otherwise IRA qualified) Indian tribe[15] relinquishes its claim to territorial sovereignty through inaction, it may nevertheless regain sovereign control over territory through Section 465 of the IRA – if no later act of Congress precludes that result.

There is a world of legal difference between a tribe's voluntary relinquishment of its claims to territorial sovereignty and a congressional extinguishment of those claims. Congress has plenary – and exclusive – power to extinguish aboriginal title. *United States v. Alcea Band of Tillamooks*, 329 U.S.

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[15] The IRA does not apply to the Narragansett Indian Tribe as shown above. Indeed, the existence of the Settlement Act itself, a congressional act designed to redress the unique land loss claims asserted by the Tribe in Rhode Island, is additional evidence of the IRA's inapplicability to the Tribe. The IRA attempted to reverse what was considered a disastrous federal policy of allotting tribal lands to individual Indians and the resulting loss of those lands. The IRA attempts to restore a land base to tribes whose land had been carved up and doled out through allotments. Section 465 of the IRA is part of that remedy. There have never been federal Indian allotments in Rhode Island. Indeed, the Tribe's 1975 Lawsuits indicate that its base was lost not through allotments but through transfers of land allegedly made in violation of the Non-Intercourse Act. These are the same claims that have been addressed by the Settlement Act. Thus, from an historical perspective, it is the Settlement Act and not the IRA that applies to the recoupment and jurisdictional attributes of Indian land in Rhode Island.

40, 46 (1946). Once aboriginal title has been extinguished by an act of Congress, it cannot be revived except by Congress.

In Rhode Island, unlike New York, Congress affirmatively extinguished aboriginal title and all Indian claims involving land. Yet, the First Circuit held that, in relation to the establishment of Indian territorial sovereignty in Rhode Island, the congressional extinguishment of aboriginal title (as opposed to a mere lapse of that title) was "beside the point." 497 F.3d at 36. Pet. App. 42. The legal fact, however, that Congress extinguished the aboriginal estate in Rhode Island, including any Indian territorial sovereignty interest, *is the point* and mandates deference to the will of Congress. In Rhode Island, the 1978 Settlement Act's extinguishment provisions are outcome determinative – preventing the 1934 IRA's "alternative means" of allowing an administrative agency to revive or reestablishing Indian sovereignty over land, absent another act of Congress.[16] When the Settlement Act extinguished aboriginal title throughout the State, it prohibited that form of land tenure and necessarily placed a future limitation on the exercise of tribal sovereignty over land in Rhode Island, including on

[16] Tellingly, when this Court described the state of the Oneida's territorial sovereignty claims, it described the claims as "in repose," 544 U.S. at 221 n.14, "gr[own] cold," *id.* at 214 and not capable of being unilaterally "revived," *id.* at 219. Here, Congress itself described the state of the Narragansett territorial sovereignty claims as "extinguished"; in other words, extinct.

the Parcel. Had Congress specifically and affirmatively extinguished the aboriginal title claim of the Oneida, as it did the Narragansett, the notion of an administrative agency reestablishing Oneida territorial sovereignty would have been soundly rejected.

It is a common-sense proposition that where Congress has extinguished the aboriginal title estate, no administrative agency can reestablish that estate through the backdoor simply by calling it a different name. When Congress extinguished aboriginal title in Rhode Island, it abolished the prototypical Indian estate. By contrast, the IRA returns to Indian tribes the land they lost through allotment and it returns that land, not in fee simple, but in that prototypical Indian estate. There is no difference between the IRA trust estate and the aboriginal estate because Congress intended the former to replicate the latter. Where Congress extinguishes aboriginal title, therefore, it necessarily prohibits trust conversions under the IRA.

### B. The Settlement Act's Extinguishment of All Indian Claims Involving Rights and Interests in Land Precludes Indian Territorial Sovereignty

The Settlement Act's broader extinguishment of all claims based on Indian interests in and rights involving land similarly slams the door shut on the future establishment and exercise of Indian territorial sovereignty in Rhode Island. If, as the First

Circuit held, the extinguishment of aboriginal title merely eliminates "traditional" property claims, then as a matter of law and logic, this second provision must extinguish Indian claims based upon "interests in" and "rights involving" land beyond such traditional property claims, including Indian territorial sovereignty claims.[17]

Specifically, Congress extinguished the Tribe's claims – as well as those of any "successor in interest" to the Tribe – as follows:

> By virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the

[17] The First Circuit held that this "all Indian claims" extinguishment "covers claims based on other forms of title, besides aboriginal title, that the Tribe might have held to land in Rhode Island prior to the Settlement Act." 497 F.3d at 36. The court thus accepted the Petitioners' core argument that this extinguishment provision eliminates claims based on "other forms" of title. One such "other form" of title is, of course, trust title. Following the First Circuit's own logic, therefore, claims based on trust title must, likewise, be extinguished.

> transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. § 1705(a)(3). A separate section of the Settlement Act similarly extinguished all other tribes' claims based on interests and rights involving land in Rhode Island. 25 U.S.C. § 1712(a)(3).

If the Secretary converts the Parcel to unrestricted trust under the IRA for the purpose of Indian housing, he will create Indian country.[18] *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 n.5 (1998) (When land is set apart by the federal government, and the land in question is under the superintendence of the federal government, it becomes "Indian country"); *United States v. McGowan*, 302 U.S. 535, 538-39 (1938) (holding trust land met set-aside and superintendency requirements of Indian country).

By its very definition, Indian country is a claim based upon an Indian "right or interest" in sovereignty over land. *See Alaska v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996) (identifying Indian country claims as being specifically barred by similar "all claims" extinguishment language

[18] Indian country is land over which the federal government and the Indian tribe inhabiting it exercise primary jurisdiction, rather than the states. *Venetie,* 522 U.S. at 527 n.1.

in the Alaska Native Claims Settlement Act) (Fernandez, concurring), *rev'd on other grounds* by 522 U.S. 520 (1998); *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908, 922 (1st Cir. 1996) (identifying the assertion of Indian country as a "claim" to presumptive sovereignty rights over land); *accord* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 Conn. L. Rev. 605, 608 (2006) (noting that Indian sovereignty is a "claim" based on the transfer of title). As such, Indian country claims are barred by the Settlement Act.

Moreover, the "all Indian claims" extinguishment specifically includes claims based on Indian "use and occupancy" of land. 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). This Court has long held that Indian "use and occupancy" includes the exercise of Indian territorial sovereignty. *See, e.g., Bourland*, 508 U.S. at 690-91 (Cheyenne Sioux Tribe's unabrogated right of "absolute and undisturbed use" encompassed the lesser included power to regulate); *Montana v. United States*, 450 U.S. 544, 558-59 (1981) (where Crow Tribe had "absolute and undisturbed use and occupation" it could exercise regulatory jurisdiction over land). Thus, the exercise of Indian territorial sovereignty is barred in Rhode Island because Congress has prohibited all claims based on Indian "use and occupancy."

Finally, the prohibition against the assertion of any Indian claims based upon "any interest in or right involving land" encompasses any and all of the component assertions of Indian rights and interests

in land that naturally accompany trust: a tribal right to be free of state and local laws and regulations; a right to impose tribal law and regulations; the right to exercise tribal police power and to be free from the exercise of state police power. Each of these Indian rights and interests arising from the trust conversion has been extinguished by the "all Indian claims" language of the Settlement Act. It simply is not possible to regain territorial sovereignty without invoking and exercising the rights that the "all Indian claims" provision has expressly extinguished.

The First Circuit tried to side step the extinguishment of tribal rights and interests in land by claiming that any restrictions the Settlement Act may have placed on the Tribe did not apply to the Secretary. 497 F.3d at 36. Pet. App. 44. ("Ultimately, this entire line of argument by the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." (emphasis in original)). The plain text of the Settlement Act as well as the special relationship between the Tribe and the United States completely defeats this reasoning.

The Settlement Act not only bars the Tribe asserting sovereignty claims to land, it also bars the federal government from making the same claim on the Tribe's behalf. It does so by extinguishing the right of any "successor in interest" to the Tribe to make a claim against the State "based upon any interest in or right involving land [in Rhode Island]." 25 U.S.C. § 1705(a)(3). When the Secretary converts

tribal fee land to federal trust property, he becomes the Tribe's successor in (fee title) interest to the Parcel and he is, thus, bound by the broad extinguishment provisions of the Settlement Act.

In addition, the Settlement Act also contains a separate and independent prohibition against the United States from eclipsing the State's sovereignty on behalf of the Tribe by taking on trust duties and liabilities:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706 and 1707, of this title, the United States shall have no further duties or liabilities under [the Rhode Island Indian Claims Settlement Act] with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands . . .

25 U.S.C. § 1707(c).

This section limits the obligations of the United States as a land trustee for the Tribe. As a result, it prevents the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits any Indian tribe from doing directly: establishing tribal sovereign territory. The Settlement Act thus places a prospective limitation on the federal government's ability to take on any further land-based duties to the Tribe, including any duty to convert or hold land in trust for it. Moreover, any contention that the extinguishment provisions of the Settlement Act do not apply to the

Secretary fail in light of the special relationship that exists between the United States and federally-recognized Indian tribes like the Narragansett. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476 n.3 (2003) (recognizing the existence of a general trust relationship between Indian tribes and the United States, characterized as "a ward to his guardian"); *cf. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (holding that whenever an Indian tribe asserts a claim under the Nonintercourse Act, the United States acts as a guardian for and fiduciary of the tribe). The Settlement Act's provisions bind the guardian, just as they bind the ward.

Accordingly, the Tribe's asserted right to or interest in exercising territorial sovereignty in Rhode Island has been foreclosed by Congress outside the Settlement Lands, just as it has been on the Settlement Lands. Likewise, the Tribe's right to invoke the federal government's protection against the uniform application of the State's laws to land anywhere in Rhode Island has been foreclosed by Congress.

### C. The Plain Language and Purpose of the Settlement Act are Incompatible with Trust Under the IRA

The plain language of the Settlement Act, with its aboriginal title and "all claims" extinguishments and its limitations on further federal responsibilities over land compel the conclusion that the Tribe may

not establish or exercise territorial sovereignty in Rhode Island absent a subsequent act of Congress. That reading forecloses the aboriginal estate in Rhode Island, however denominated, and results in the elimination of all Indian claims to land.

The Settlement Act's legislative history evinces a clear intent to limit the extinguishment provisions to land claims that can be made uniquely by Indians. "As noted in the Settlement Agreement, extinguishment of Indian land claims is limited to those claims raised by Indians qua Indians, and is not intended to affect or eliminate the claim of any Indian under any law generally applicable to Indians as well as non-Indians in Rhode Island." H.R. Rep. 95-1453 (1978) reprinted in 1978 U.S.C.C.A.N. 1948, at 1955. A claim that an Indian tribe may exercise territorial sovereignty over land to the exclusion of state law is, of course, the *quintessential* Indian claim to land and one to which Congress was doubtless alluding by its use of the phrase "Indian qua Indian."

Reading the Settlement Act as precluding trust comports with the intent of the parties in settling the Lawsuits. When the State and the Tribe settled the Lawsuits, they agreed that federal legislation would be obtained "that eliminates all Indian claims of any kind, whether possessory, monetary *or otherwise*, involving land in Rhode Island. . . ." JMOU at 6 (emphasis added). J.A. 25. If the intent of the settlement had been to eliminate only conventional claims to land, the JMOU would have stopped at the extinguishment of possessory and monetary claims. Instead,

the settling parties, including the Tribe, agreed to seek federal legislation that went beyond the extinguishment of these conventional claims and further extinguished "other" claims that could be brought by Indian tribes, including sovereignty claims.

This interpretation of the Settlement Act makes sense and honors the disposition of the Lawsuits. It eliminates all further Indian claims to land, not just some ill-defined subset of those claims. It ensures the uniform application of the State's laws within its boundaries, a critically important feature given the state's tiny size and its densely packed population. Finally, after the Lawsuits were settled, the State, by agreement of all the parties, retained sovereign control over the Parcel. Wresting sovereign control over the Parcel from the State, whether by trust conversion or otherwise, would undo the allocation of sovereignty established by that settlement.

Conversely, reading the Settlement Act to permit the Secretary to convert the Parcel to trust makes little sense. Such a reading vitiates the essential purpose of the Settlement Act which was "intended to resolve once and for all the claims being asserted by the Narragansett Indians to lands in the Town of Charlestown." H.R. Rep. 95-1453 (1978) reprinted in 1978 U.S.C.C.A.N. 1948, at 1958. As this case amply demonstrates, permitting the reestablishment of the aboriginal estate in Rhode Island encourages, rather than resolves, claims between the Tribe, the State and its municipalities over their respective sovereign rights and interests in land. Moreover, reading the

Settlement Act to permit the Secretary to take land into trust for the Tribe yields an anomalous result. On the Settlement Lands – the heart of the Tribe's ancestral home – the Tribe remains subject to the State's civil and criminal laws and jurisdiction while everywhere else it may establish and exercise territorial sovereignty. Such a result is at odds with the clear language of the Settlement Act as well as with the intent of Congress and the parties in reaching a settlement of the Lawsuits.[19]



[19] As discussed at length in the Governor's Brief, construing the Settlement Act as prohibiting the creation of Indian country in Rhode Island is also entirely consistent with this Court's interpretation of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* ANSCA preceded and was a model for the Settlement Act. The structure of both congressional acts evince an intent to divest Indian sovereign control over land – an intent four square contrary with placement of land into trust under the IRA.

## CONCLUSION

For the reasons stated above, and in the briefs of the other Petitioners, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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